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### The Uniform Product Liability Act--A Brief Overview

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# The Uniform Product Liability Act—A Brief Overview\*

Victor E. Schwartz\*\*

I deeply appreciate the invitation of the *Vanderbilt Law Review* to participate in a Symposium honoring my colleague, Dean John W. Wade. I am serving as a federal official and writing about a topic developed by the federal government. As readers of this periodical can appreciate, that puts an author—especially a law review author—under special constraints. His or her view, no matter how carefully caveated or “asterisked,” may be read as reflecting official policy; and, for better or worse, official policy does not have the subtle nuances that are found in many law review articles. Nevertheless, the editors of the *Vanderbilt Law Review* suggested that I provide an overview of the Department of Commerce’s new Uniform Product Liability Act (Uniform Act).<sup>1</sup> In deference to their judgment and the general interest the Act has provoked, I have complied with their suggestion.

## I. THE PRODUCT LIABILITY PROBLEM—BACKGROUND

In 1975, business writers and manufacturers took steps to confront what they saw as a serious problem (some sources said “crisis”) in the product liability field. They alleged that product liability insurance had become unavailable or unaffordable. The consequences of this situation included the possibilities that businesses might terminate because they were unable to get coverage, that injured persons would be unable to enforce their product liability judgments, and that manufacturers would hesitate to produce some products that would be useful in our society—pharmaceuticals, for example. In general, it was alleged that the system of private insurance in the field of product liability was breaking down.

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\* The official views of the Department of Commerce in regard to the Uniform Product Liability Act (UPLA) have been set forth in 44 Fed. Reg. 62,714-50 (1979). Any views expressed herein inconsistent with those documents are solely those of the author.

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1. UNIFORM PRODUCTS LIABILITY ACT, reprinted in 44 Fed. Reg. 62,714 (1979) [hereinafter cited as U.P.L.A.].

In April 1976, a Federal Interagency Task Force on Product Liability was established by the Economic Policy Board of the White House to study the product liability problem and report back to the Policy Board on or before December 15 of that year. *The Federal Interagency Task Force on Product Liability Briefing Report*<sup>2</sup> was released to the public on January 4, 1977. The *Briefing Report* was a highly condensed "still picture" of the product liability problem as it existed in December 1976. It was based on preliminary drafts of three independent studies commissioned by the Task Force as well as pre-December 1, 1976 data and information. When the Carter Administration took office, it requested the Task Force to edit and publish these reports, a task which was completed in the spring of 1977.<sup>3</sup> The Administration also asked the Task Force to prepare a *Final Report* that would give citizens as well as policy-makers an in-depth view of the product liability problem and its consequences. That report was published in November 1977.<sup>4</sup>

Among other things, the Task Force reported a substantial increase in the cost of product liability insurance since 1974. The increase appeared to have been greater for small, as compared to large, businesses. Product liability concerns had deterred the introduction of new products, but problems in the product liability area had not, by themselves, caused actual business failures. On the other hand, circumstantial evidence suggested that substantial product liability premium increases may have been one of several factors that caused small businesses in high risk product industries to go out of business. The *Final Report* concluded that some sources had grossly exaggerated the number of product liability claims. For example, the Insurance Information Institute had reported that there were "a million claims" filed in 1976.<sup>5</sup> After an actual closed claim survey was conducted, insurance industry sources reduced the estimate to between sixty and seventy thousand claims.<sup>6</sup>

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2. INTERAGENCY TASK FORCE ON PRODUCT LIABILITY BRIEFING REPORT (1977). This and other Task Force Reports, see notes 3 and 4 *infra*, are available from the National Technical Information Service, Springfield, Virginia 22161 (Attention: Sales Desk). The accession number is PB 262 515. The price is \$4.50. Checks should be enclosed and made payable to NTIS.

3. For general information on obtaining reports see note 2 *supra*. The details of the 1977 reports are as follows: LEGAL STUDY (The Research Group, Inc. 1977) (Accession No. PB 263 601, \$31.25); INDUSTRY STUDY (Gordon Associates, Inc. 1977) (Accession No. PB 265 542, \$21.25); INSURANCE STUDY (McKinsey, Inc. 1977) (Accession No. PB 263 600, \$9.00).

4. INTERAGENCY TASK FORCE ON PRODUCT LIABILITY FINAL REPORT (1977) (Accession No. PB 272 220, \$20.00) [hereinafter cited as FINAL REPORT].

5. INSURANCE INFORMATION INSTITUTE, INSURANCE FACTS 1976, at 8.

6. *Product Liability Insurance Hearings Before the Subcomm. on Capital, Investment and Business Opportunities of the House Comm. on Small Business, Part 2*, 95th Cong., 1st Sess. 547 (1977) (statement of Mavis A. Walters).

The Task Force<sup>7</sup> also found that in the overwhelming majority of cases, insurance company sources did not rely on data to support premium increases that occurred in the 1974-1976 period. While circumstantial evidence suggested that some insurers engaged in "panic pricing,"<sup>8</sup> the *Final Report* concluded that insurance rate-making practices alone were not the cause of the problem. Growing uncertainties in tort law, especially the continued common-law creation of retroactive product liability rules, had created a major rate-making problem for insurers. Even if insurers collected more extensive claims data, continued uncertainty in product liability law would, in turn, foster overly subjective ratemaking practices.<sup>9</sup>

The Task Force found that strict liability may have been less "strict" than some sources alleged. On the other hand, it also found that some appellate courts viewed product liability law not as a means of apportioning responsibilities among parties but as a compensation system. Some decisions came close to holding that the tort litigation system should provide a recovery whenever a person was injured by a product.<sup>10</sup> Although those cases appeared to be relatively few in number, insurers regarded them as quite important in their underwriting practices.

## II. FROM STUDY TO LEGISLATIVE ACTION

The Task Force was not permitted to make specific legislative recommendations. After the *Final Report* was published, however, the Administration asked the Department of Commerce to prepare an options paper regarding what, if any, federal action should be taken to attack the product liability problem. That options paper, published in the Federal Register in April 1978,<sup>11</sup> contained both long- and short-range measures<sup>12</sup> addressing the problem. In general, the long-range measures were directed at the principal causes of the problem—inadequate insurer ratemaking procedures, uncertainties in the tort litigation system, and unsafe manufacturing practices.<sup>13</sup> When the Administration made its decisions, it followed Commerce's recommendation that any long-range measures specifically address these principal problem areas.<sup>13</sup>

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7. *Id.* at 522 (statement of Phillip H. Dutter).

8. See *FINAL REPORT*, *supra* note 4, at I-27.

9. *Id.* at I-26.

10. OPTIONS PAPER ON PRODUCT LIABILITY AND ACCIDENT COMPENSATION ISSUES, 43 Fed. Reg. 14,612 (1978).

11. *Id.* at 14,622-25.

12. Federal action focusing on unsafe manufacturing practices will not be discussed in this Article.

13. See OPTIONS PAPER ON PRODUCT LIABILITY AND ACCIDENT COMPENSATION ISSUES—SYNTHESIS OF PUBLIC COMMENT, 43 Fed. Reg. 40,438 (1978).

In the area of insurance ratemaking, the Administration asked Commerce to explore how self-insurance could be facilitated. The Administration reasoned that if product sellers were given a realistic opportunity to insure themselves, commercial insurers, to stay competitive, would set rates and premiums in accord with the very best actuarial assessment of actual product risk. In response, Commerce developed, and the Administration supported, the Risk Retention Act (RRA).<sup>14</sup> The RRA permits product sellers to form their own self-insurance groups (with a federal charter); these groups will be exempt from state insurance regulation. The RRA also exempts product sellers from state "fictitious group" laws,<sup>15</sup> thus allowing small businesses to band together and bargain with commercial insurers in order to obtain group rates. The Act has been approved by the House of Representatives and is now before the Senate.<sup>16</sup>

To address the problems of uncertainties in the tort system, Commerce was asked to draft a Uniform Product Liability Act that would serve as a model for the states. On January 12, 1979, Commerce's Draft Uniform Product Liability Law was published in the Federal Register for public comment.<sup>17</sup> Commerce received comments on the draft totaling approximately 1500 pages and representing 240 separate communications. The Department also made a special effort to bring the Draft Law to the attention of consumers. Working with its Director of Consumer Affairs and the Office of the Special Assistant to the President for Consumer Affairs, Commerce conducted consumer forums in Washington, D.C., Detroit, Los Angeles, and Atlanta. In addition to meeting with consumer groups, the drafters of the Uniform Act met with representatives of product seller and insurer groups who expressed an interest in the proposal. The Draft Law was also reviewed at hearings before the Subcommittee on Oversight and Minority Enterprises of the House Committee on Small Business, and before the Subcommittee on Consumer Protection and Finance of the House Committee on Interstate and Foreign Commerce. Interested government agencies also commented on the Draft Law.

In preparing the initial drafts and final version<sup>18</sup> of the Act, Commerce gave careful attention to existing state, congressional,

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14. H.R. 6152, 96th Cong., 1st Sess., 125 CONG. REC. 12,101; S. 1789, 96th Cong., 1st Sess., 125 CONG. REC. 13,187 (1979) [hereinafter cited as R.R.A.]. See also United States Department of Commerce News, Aug. 16, 1978.

15. R.R.A., §§ 201-203.

16. 126 CONG. REC. H1,683 (daily ed. March 10, 1980). The roll call vote was 332-17.

17. 44 Fed. Reg. 2996 (1979).

18. U.P.L.A., 44 Fed. Reg. 62,714 (1979).

and private studies of product liability. Apart from legal literature and case law, close attention was paid to the *Product Liability Closed Claims Survey* conducted by the Insurance Services Office in 1976-1977.<sup>19</sup> This document provides an instant picture of over 23,000 product liability claims. The Department also reviewed all major insurance proposals introduced in state legislatures in the preceding two years.<sup>20</sup>

In developing the Uniform Act, Commerce was guided in part by six criteria:<sup>21</sup>

1. To insure that persons injured by unreasonably unsafe products receive reasonable compensation for their injuries.
2. To insure the availability of affordable coverage to product sellers whose manufacturing practices are reasonably safe.
3. To place the incentive for loss prevention on the party or parties who are best able to accomplish that goal.
4. To minimize the interval between the time of injury and the time a claim is paid.
5. To minimize the sum of accident costs, prevention costs, and transaction costs.
6. To use comparatively clear and precise language.

Some of these criteria naturally conflicted with others. While each was considered in formulating the Uniform Act, the overriding objective was to balance fairly the interests of all groups affected by product liability. There is little doubt that the Uniform Act was helped toward that goal by the detailed comment generated by the first draft.

### III. SOME HIGHLIGHTS OF THE UNIFORM ACT

#### A. *The Uniform Act's Policy Foundations*

Underlying the Uniform Act<sup>22</sup> is the recognition that product liability law is a branch of the law of torts. The function of tort law

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19. INSURANCE SERVICES OFFICE PRODUCT LIABILITY CLOSED CLAIMS SURVEY: A TECHNICAL ANALYSIS OF SURVEY RESULTS (1977) [hereinafter cited as CLOSED CLAIMS SURVEY].

20. See U.P.L.A. app. A, 44 Fed. Reg. at 62,750 (1979).

21. *Id.* at 62,714-15. See also FINAL REPORT, *supra* note 4, at VII-2 to -9.

22. This Article will not describe the details of each section of the Uniform Act. Rather, it will present an overview of some of the more important specifics of the Uniform Act. Readers who desire more detail should consult the analyses accompanying each section of the Uniform Act. These analyses show not only why the drafters chose a particular approach but also why they declined suggested alternatives. Thus, in instances when the Department departed from a particular approach advocated by a substantial segment of the public, the reasons for doing so are explained.

is to shift the cost of an accident from a claimant to a defendant when the defendant is deemed "responsible" for the claimant's injuries. The drafters of the Uniform Act believe that this "responsibility" should be defined in terms that everyone can understand; rhetoric and catch phrases are poor substitutes for analysis in the field of product liability. In the interests of clarity, therefore, those who write product liability law, whether they be judges, legislators, or others, should take care to specify why a particular product seller is sufficiently blameworthy that it should bear the cost of that injury. As the introduction to the Uniform Act indicates, "[t]ort law is not a compensation system similar to Social Security or Worker Compensation."<sup>23</sup> Therefore, a product seller should not, through the medium of tort law, be asked to pay damages merely because its product caused an injury.

While almost all courts have agreed with that assumption, some decisions have paid it only lip service in recent years. This is unfortunate because it camouflages a basic public policy determination. It is the judgment of the drafters of the Uniform Act that if a policy judgment is made that product sellers are to bear the costs of all injuries caused by their products, it would be more efficient to make purchasers third-party beneficiaries of product sellers' insurance policies. In an approach of that kind, an injured person's damages would be limited. There would be only partial recovery of loss of wages, and no recovery for pain and suffering.

In sum, the Uniform Act adopts a tort liability approach rather than a compensatory approach to products claims. The plaintiff may receive full tort damages, but in allowing full recovery, the Uniform Act insists that there must be an articulation of why an individual product seller was responsible.

### *B. Basic Standards of Responsibility*

In section 104, the Uniform Act indicates that a product may be proven defective in four basic ways:

1. It was unreasonably unsafe in construction;
2. It was unreasonably unsafe in design;
3. It was unreasonably unsafe because adequate warnings or instructions were not provided; and
4. It was unreasonably unsafe because it did not conform to a product seller's express warranty.

With respect to products that were defective in construction or

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23. U.P.L.A., Introduction, 44 Fed. Reg. at 62,715 (1979).

that failed to conform to an express warranty, the Uniform Act applies strict liability. The *Final Report* showed that strict liability for defects in construction can be absorbed within the existing liability insurance system.<sup>24</sup> Construction defects are more predictable than design defects or problems relating to failure to warn. Strict liability for defects in construction is also consistent with section 402A of the *Restatement (Second) of Torts*<sup>25</sup> and with implied warranty law. These sources agree that consumers have a right to expect products to be free from construction defects. A substantial amount of public comment from consumers and product sellers on the Draft Law supported this approach. Strict liability can also be justified with respect to breach of an express warranty. If a product seller makes a specific representation about its product, it is fair to hold it to that promise.<sup>26</sup> Moreover, the consumer has a right to expect that a product will live up to the product seller's representation.

Strict liability cannot be justified, however, for either design defects that are predicated on a failure to warn or instruct. Such claims should be based on a practical fault standard. Some courts have attempted to apply strict liability in these areas. They have sought to justify the result under a theory of "risk distribution," wherein the product seller distributes the cost of all product related risks through liability insurance. The problem with this approach is that the "risk distribution" rationale provides no stopping point short of absolute liability. Thus, a number of courts have plunged into a foggy area that is neither strict liability nor negligence. The courts state that they are not imposing "absolute" insurer liability but they have been unable to articulate why they draw the line short of that point.<sup>27</sup> The result has been the creation of a wide variety of legal formulae,<sup>28</sup> unpredictability for consumers, and instability in the insurance market.

A paradigm of a court's struggle to apply strict liability principles in a defective design case is *Turner v. General Motors Corp.*<sup>29</sup>

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24. FINAL REPORT, *supra* note 4, at VII-17.

25. Dean Wade, who participated in the drafting of Section 402A, has observed that the *Restatement* authors were focusing on product liability cases dealing with mismanufacture or defective construction, and not on cases dealing with defective design or duty to warn. See Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 830 (1973). See also RESTATEMENT (SECOND) OF TORTS § 402A, App. (1965) (almost all cases cited dealt with construction defects).

26. See W. PROSSER, LAW OF TORTS 651-52 (4th ed. 1971) (decisions to the contrary have been amazingly few).

27. See U.P.L.A. § 104, 44 Fed. Reg. at 62,722 (1979).

28. See, e.g., Hagans v. Oliver Mach. Co., 576 F.2d 97, 99-100 (5th Cir. 1978); Dreisonstock v. Volkswagenwerk, 489 F.2d 1066, 1071 (4th Cir. 1974).

29. *Turner v. General Motors Corp.*, 584 S.W.2d 844 (Tex. 1979).



In *Turner*, the plaintiff was injured when his car's roof caved in as the car rolled over following an accident. The court held that strict liability rules were applicable when the design defect was the cause of plaintiff's injuries even though the defect was not the cause of the accident. The case began in 1971 and it has taken over eight years, with a number of Texas Supreme Court opinions,<sup>30</sup> for the case to be finally resolved.

The Uniform Act approaches a design case of this type by directing the court and trier of fact to balance two pairs of factors. The claimant must prove that, at the time of manufacture, the likelihood that the product would cause claimant's harm or similar harms, and the seriousness of those harms, outweighed both the manufacturer's burden of producing a product with an alternative design that would have prevented those harms and any adverse effect that alternative design might have on the usefulness of the product. Thus, the formula balances risk against utility and does not rely on hindsight. The Uniform Act also identifies the type of evidence that is relevant to this determination (for example, the new or additional harms that might have resulted if the product were designed differently).

With respect to products that are allegedly defective because the product seller failed to provide an adequate warning or instruction with its product, the Uniform Act also adopts a fault standard. Again, a formula is utilized. The claimant must prove that, at the time of manufacture—(1) the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, rendered the manufacturer's instructions or warnings inadequate; and (2) the manufacturer should and could have provided the instructions or warnings that the claimant alleges would have been adequate. The Uniform Act then outlines some factors to consider in making this determination (for example, the clarity and conspicuousness of the warnings that were provided). The claimant must also prove that the warnings it alleges would have been adequate would also have been effective, either because, as a result of the warning, a reasonably prudent product user would have declined to use the product, or because he or she would have used it in a manner so as to have avoided the harm.<sup>31</sup> The Uniform Act does not require product sellers to warn about obvious dangers. Requiring such warnings would diminish the effectiveness of other more important warnings. We should not reach the stage in our law where the manufacturer of a safety pin must warn, "Do not

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30. *Id.* See also *Turner v. General Motors Corp.*, 514 S.W.2d 497 (Tex. Ct. App. 1974).

31. See *Technical Chem. Co. v. Jacobs*, 480 S.W.2d 602 (Tex. 1972).

swallow when open.”<sup>32</sup> The Uniform Act does, however, require that the manufacturer act as a reasonably prudent product seller with respect to warning product users about dangers discovered after the product is sold. This is a particular problem in product liability law today, and an appropriate rule of law has been provided to address it.

These are the basic standards of responsibility for manufacturers. The Uniform Act also provides liability standards for parties in the distribution chain other than manufacturers, e.g., wholesalers, retailers, and distributors.<sup>33</sup> These parties are frequently brought into liability suits even though there is no intent to impose the ultimate damage awards on them. This process is expensive and adds an unnecessary cost to products.<sup>34</sup>

The Uniform Act, therefore, generally limits the liability of product sellers who are not manufacturers to instances in which they themselves have been negligent. The focus of judicial inquiry will be on the product seller's own conduct and whether the seller failed to use reasonable care with respect to that product. The seller is not liable for construction and design defects that an ordinary prudent product seller would not discover, but it is expected to convey warnings or instructions developed by the manufacturer for the product user. It is also liable for breach of its own express warranties.

In the unusual situation in which the manufacturer of the product is out of business or not subject to judicial process, or when a court determines that it is highly probable that the claimant would be unable to enforce a judgment against the manufacturer, a non-manufacturer product seller will be held to the standards of care applicable to a manufacturer. In balancing the equities between the consumer and the product seller, the drafters of the Uniform Act judged that it was fair and reasonable to protect the consumer, since the product seller sold the defective product.

In sum, the Uniform Act presents one unified cause of action for injuries to persons and damage to property caused by products. The Uniform Act supplants muddled theories of negligence, warranty, and strict liability. It leaves recovery for product-related economic harms to the Uniform Commercial Code.<sup>35</sup>

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32. See generally Twerski, Weinstein, Donaker & Pichler, *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495 (1976).

33. U.P.L.A. § 105, 44 Fed. Reg. at 62,726 (1979).

34. CLOSED CLAIMS SURVEY, *supra* note 19, at 90-94. See also *Pender v. Skillcraft Indus., Inc.*, 358 So. 2d 45 (Fla. Dist. Ct. App. 1978).

35. On the other hand, the Uniform Act explicitly preempts the U.C.C. and similar laws in instances in which such laws have governed matters within the Act's coverage, i.e., actions for personal injury, illness, death, or damage to property (other than to the product itself).

*C. Other Features of the Uniform Act*

## (1) State of the Art

There has been considerable debate in product liability law as to the place of the "state of the art" in determining whether a product is designed defectively or instructions for its use are inadequate.<sup>36</sup> The term has come to mean different things to different parties; for that reason, the final version of the Uniform Act does not use the term as a standard of liability. The Uniform Act indicates that evidence of "custom" in a product seller's industry, existing at the time of or prior to manufacture, is admissible, but it is given no special evidentiary weight.<sup>37</sup> On the other hand, if a product seller proves that it was not within "practical technological feasibility"<sup>38</sup> for it to make the product safer with respect to design and warnings or instructions at the time of manufacture so as to have prevented claimant's harm, the product seller will, in general, not be liable for defects in design or failure to warn. There are exceptions to this rule which are intended to protect consumer rights. The product seller may be liable if it acted unreasonably in selling the product at all,<sup>39</sup> or if it violated an express warranty<sup>40</sup> or failed to meet a post-manufacture duty to warn about the product.<sup>41</sup>

## (2) Compliance with Standards

Another issue in product liability law that has wrought a good deal of controversy concerns the relevance of compliance and non-compliance with legislative or administrative standards.<sup>42</sup> The Uniform Act indicates that if the injury-causing aspect of a product was

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36. Whereas product sellers argue that it is unfair to deem a product defective when it is in compliance with the state of the art and industry custom is likely to incorporate all cost-justified product safety features, consumer groups respond that it is inappropriate to allow product sellers to fix indirectly their own standard of liability.

37. U.P.L.A. § 107(C), 44 Fed. Reg. at 62,728-30 (1979).

38. By "practical technological feasibility," the Uniform Act means the technical, mechanical, and scientific knowledge relating to product safety that was reasonably feasible for use in light of economic practicality at the time of manufacture. *Id.* § 107(D), 44 Fed. Reg. at 62,728 (1979).

39. For example, a child's toy might comply with what was technologically feasible yet, because of its danger, it would be unreasonable to market the product for young children.

40. See *Crocker v. Winthrop Lab.*, 514 S.W.2d 429 (Tex. 1974) (liability imposed when product seller advertised that pharmaceutical was "free and safe from all dangers of addiction" and claimant, because of an unforeseeable susceptibility, became physically dependent).

41. See *Schenebeck v. Sterling Drug, Inc.*, 423 F.2d 919 (8th Cir. 1970); *Comstock v. General Motors Corp.*, 358 Mich. 163, 99 N.W.2d 627 (1959).

42. Product sellers contend that since such standards are drafted by government experts after considerable study and public scrutiny, it is unfair to allow lay jurors to reevaluate the standard. Consumers, on the other hand, argue that such standards represent compromises which are at times unduly influenced by industry.

in compliance with a legislative or administrative regulation relating to design or performance, the product shall not be deemed defective unless the claimant proves that a reasonably prudent product seller would and could have taken additional precautions. Conversely, if the injury-causing aspect of the product was not in compliance with such a standard, the product shall be deemed defective unless the product seller proves that its failure to comply was a reasonably prudent course of conduct under the circumstances.

### (3) Product Life

Perhaps the most controversial area in product liability law today concerns the length of time product sellers should be subject to liability.<sup>43</sup> Under the Uniform Act, product sellers are not subject to liability for harms that arise after the product's "useful safe life" has expired.<sup>44</sup> A product's "useful safe life" begins at the time of delivery to a purchaser who is not engaged in the business of selling the product and extends through the time in which it would "normally be likely to perform or be stored in a safe manner."<sup>45</sup> In a claim that involves a harm caused more than ten years after the time of delivery to a purchaser who was not engaged in the business of selling such products, a presumption arises that the product has been used beyond its useful safe life. This presumption may be rebutted by clear and convincing evidence. The presumption is applicable in both workplace and non-workplace products—an important change from the first draft of the Uniform Act.

Nevertheless, to protect the consumer, the presumption will not apply if—(1) the product seller expressly warrants that its product can be used for a longer period; (2) the product seller intentionally misrepresents or conceals information about a product; (3) the harm was caused by prolonged exposure to a defective product;<sup>46</sup> or (4) the injury-causing aspect of the product that existed at the time of delivery was not discoverable by an ordinary reasonably prudent person until ten years after that time.<sup>47</sup> The Uniform Act also protects the consumer with its statute of limitations which runs two

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43. Since most policies cover claims based on products manufactured or sold in the past, insurers fear open-ended liability in the case of sellers of durable goods. In response to this concern, some states have enacted statutes of repose that begin at the time a product is first sold and distributed. The problem with these statutes, however, is that a person injured by a product may lose his right to bring a claim even before his injury has actually occurred.

44. U.P.L.A. § 110(A)(1), 44 Fed. Reg. at 62,732 (1979).

45. *Id.*

46. *See, e.g.,* Michie v. Great Lakes Steel Div., 495 F.2d 213 (6th Cir. 1974).

47. *See, e.g.,* Mickel v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969) (plastic used on gear shift lost its resiliency when exposed to sunlight).

years from the time the claimant discovered, or in the exercise of due diligence should have discovered, the harm and its cause.

By reading the Uniform Act's materials on state of the art in conjunction with those on product life, one can get an idea of the Uniform Act's general philosophy. A manufacturer is generally not liable for risks that it could not, as a reasonably prudent party, discover or prevent.<sup>48</sup> On the other hand, when a claimant would have no reason to discover a harm and its cause, he or she will not be barred from bringing an action.

#### (4) Comparative Fault

The Uniform Act makes full use of comparative responsibility principles. Section 112 sets forth different types of conduct which affect comparative fault. They are:

1. Failure to discover a defective condition—claimant is under no duty to inspect, but is expected to discover a defect that would be apparent to an ordinary person without inspection;
2. Use of a product with a known defective condition—generally, claimants may not create their own product liability claims by using a product with a known defective condition, but there may be circumstances justifying such conduct (for example, when a person discovers a welt in a tire, it may be reasonable to proceed cautiously to a nearby service station rather than to stop and immediately call for assistance);
3. Misuse of a product—damages are reduced to the extent that the misuse caused the harm;
4. Alteration or modification of a product—generally, damages are reduced to the extent that product alteration or modification, by someone other than the product seller, contributed to or caused the harm.

The procedures for implementation of these principles are contained in section 111 of the Uniform Act.

Perhaps the most important application of these principles relates to misuse or modification of products.<sup>49</sup> When a product seller proves that product misuse contributed to a claimant's harm, damages are subject to reduction or apportionment to the extent that the misuse was a cause of the harm. "Misuse" occurs when a product is used in a manner that a reasonably prudent manufacturer

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48. An important exception to this is the manufacturer's liability for construction defects. See U.P.L.A. § 104(A), 44 Fed. Reg. at 62,721 (1979).

49. *Id.* §§ 112(C), (D), 44 Fed. Reg. at 62,737 (1979).

would not foresee. It seems inappropriate to burden those who use products correctly with insurance costs that arise not from product defects but from product misuse.

The Uniform Act takes the same general approach with respect to alteration or modification of products.<sup>50</sup> An "alteration or modification" occurs when a party other than the product seller changes the design, construction, or formula of the product, or removes or changes warnings or instructions that accompanied or were displayed on the product. When a product seller proves that an alteration or modification of the product caused the claimant's harm, damages shall be subject to reduction to the extent that the alteration or modification was a cause of the harm. The defense does not apply if the product seller authorized or consented to the alterations or modifications, or if the product seller would have expected a reasonably prudent person to make such alterations or modifications in the same or similar circumstances.

#### (5) Workers' Compensation

Perhaps one of the thorniest areas of product liability law concerns the relationship between product liability and worker compensation. The Uniform Act follows the approach that was developed by the American Insurance Association and recommended in Congressman LaFalce's Subcommittee on Capital, Investment, and Business Opportunities.<sup>51</sup> First, neither the employer nor its worker compensation carrier has a right of subrogation against the product seller when its product has caused an injury to an employee. Second, a damage award rendered against a product seller is reduced by the amount of worker compensation benefits paid for the same injury. Third, the employer's worker compensation benefits shield is preserved. This approach keeps worker compensation and product liability independent and reduces the cost of shifting damages

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50. *Id.*

51. *Id.* § 114, 44 Fed. Reg. at 62,740 (1979). The need for change arises from the fact that under the current law of a number of jurisdictions, the interaction of product liability and worker compensation law results in the manufacturer of a workplace product paying the entire cost of a product related workplace injury because he is unable to place a portion of that cost on an employer whose negligence may have contributed to the injury. This reduces the employer's incentive to keep workplace products safe. There are problems with other alternatives as well. If, for example, a full contribution claim is permitted in all cases in which the employer is at fault, the employer may be forced to pay an amount in excess of his or her statutory worker compensation liability, thereby thwarting the central concept behind that compensation system. On the other hand, if contribution is not permitted, a manufacturer may be forced to pay the full amount of the judgment despite the possibly greater responsibility of the employer.

from one system to another.<sup>52</sup> This, in turn, will help stabilize insurance rates and premiums. Nevertheless, the approach protects the rights of injured employees, who recover the same amount as they would under the present system. Finally, the approach should encourage employers to keep workplace products in a safe condition, since subrogation is not permitted.

#### IV. CONCLUSION

There are many important aspects of the Uniform Act that have not been discussed herein including provisions on assumption of risk,<sup>53</sup> punitive damages,<sup>54</sup> and contribution among joint tortfeasors.<sup>55</sup> Nevertheless, the examples that have been given show that it is a law that attempts to balance the interests of product users and sellers. It is the Department's hope that state legislatures will give it serious consideration and that it will help bring about uniformity in the key areas of product liability law. As long as courts can retroactively create new and unprecedented product liability law, the specter of future product liability crises will continue. Statutory uniformity in key areas of product liability law can stabilize product liability insurance ratemaking and serve as a bulwark against such crises.

In conclusion, it is the Department's view that the Uniform Product Liability Act will help stabilize product liability rates and premiums. The Risk Retention Act will help assure that commercial insurance rates, now and in the future, are set on a truly competitive basis. It is clear that the Uniform Product Liability Act and the Risk Retention Act are synergistic; each will help make the other more effective. The remedies can end the product liability problem for product sellers without compromising consumer rights.

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52. Transaction costs are of a substantial importance in product liability. See CLOSED CLAIMS SURVEY, *supra* note 19, at 90-94.

53. U.P.L.A. § 110, 44 Fed. Reg. at 62,748 (1979).

54. *Id.* § 120, 44 Fed. Reg. at 62,748 (1979).

55. *Id.* § 111(B), 44 Fed. Reg. at 62,734 (1979).